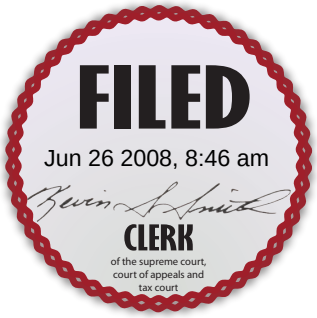

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IN THE
COURT OF APPEALS OF INDIANA

ANDRES HERNANDEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0711-CR-633
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Barteau, Judge Pro Tempore
Cause No. 49G05-0605-FA-89333

June 26, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Andres Hernandez ("Hernandez") was convicted in Marion Superior Court of three counts of Class A felony child molesting and one count of Class C felony child molesting and was sentenced to an aggregate term of thirty-four years. Hernandez appeals and presents five issues for our review, which we consolidate and restate as:

I. Whether the evidence is sufficient to support Hernandez's convictions;

II. Whether Hernandez's convictions constitute double jeopardy; and

III. Whether the sentence imposed by the trial court is inappropriate.

We affirm.

Facts and Procedural History

Hernandez's wife babysat A.R., who was born on November 3, 1997. Hernandez's wife also babysat A.R.'s older sister and several other children at their apartment in Indianapolis. When his wife needed to leave the apartment to run errands, Hernandez would watch the children. When A.R. began to attend first grade in August of 2003, Hernandez began to molest her while his wife was away from the apartment. On one occasion, Hernandez told A.R. to come to his bedroom, where he closed the door and told her to pull down her pants and underwear and lay on the bed. When A.R. did so, Hernandez pulled his pants and underwear down and touched A.R.'s "private part" with his "private part." Tr. p. 32. A.R. identified her "private part" as being the area between her legs and identified Hernandez's "private part" as a "penis." Tr. pp. 17-18, Ex. Vol., 1, 2. A.R. testified that this touching "hurt" her "on the outside . . . on my private part."

Tr. p. 32. Hernandez told A.R. not to tell anyone what had happened because, if she did, he would go to jail.

On another occasion when his wife was out of the apartment, Hernandez told A.R. to come into the bedroom again. He again told her to lie down on the bed and remove her pants and underwear. Hernandez then kissed and licked A.R. on the area between her legs. Hernandez also took his pants and underwear off and told A.R. to kiss his penis. A.R. testified that "it happened" at the apartment twenty to thirty times. Tr. p. 49.

On yet another occasion, Hernandez took A.R., her sister, and some other children who his wife was babysitting to fish at a nearby lake. While they were walking to the lake, Hernandez told the other children to go ahead to the lake but told A.R. to stay behind with him. When the other children were out of sight, Hernandez removed his pants and underwear and told A.R. to do the same. Hernandez then touched the area between A.R.'s legs with his penis. When the other children yelled for Hernandez and A.R., he stopped what he was doing, and he and A.R. went fishing with the others. A.R. testified that "it happened" at the lake fifteen to twenty times. Tr. pp. 49-50.

When A.R. was in third grade, she attended a program at school described as a "good touch/bad touch" program. She told the police officer who presented the program what Hernandez had done to her. When she returned home that day, A.R. also told her mother what had happened.

On May 19, 2006, the State charged Hernandez as follows: Count I, Class A felony child molesting for performing sexual intercourse on A.R.; Count II, Class A felony child molesting for performing deviate sexual conduct on A.R.; Count III, Class A

felony child molesting for submitting to deviate sexual conduct with A.R.; and Count IV, Class C felony child molesting for fondling or touching A.R. with the intent to arouse or gratify Hernandez's sexual desires. Trial was held on September 6 and 7, 2007, at the conclusion of which the jury found Hernandez guilty as charged. The trial court held a sentencing hearing on October 3, 2007, and imposed the advisory sentence of thirty years on each Class A felony, to run concurrently with each other. On the Class C felony, the trial court imposed the advisory sentence of four years, to be served consecutively to the concurrent thirty years sentences. Hernandez was thus sentenced to a total of thirty-four years incarceration. Hernandez now appeals.

I. Sufficiency of the Evidence

Hernandez attacks the sufficiency of the evidence supporting his convictions. In reviewing a challenge to the sufficiency of the evidence, this court will neither reweigh the evidence nor judge witness credibility. Kien v. State, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), trans. denied. Instead, we consider only the evidence which supports the conviction along with the reasonable inferences to be drawn therefrom. Id. We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Id.

A. Evidence of Penetration

Hernandez first claims that the evidence is insufficient to prove that he had sexual intercourse with A.R. as alleged in Count I. Under the controlling statute, a person who is at least twenty-one years of age who performs sexual intercourse with a child under

fourteen years of age commits child molesting as a Class A felony. Ind. Code § 35-42-4-3(a)(1) (2004 & Supp. 2007). The term "sexual intercourse" is defined by statute as "an act that includes any penetration of the female sex organ by the male sex organ." Ind. Code § 35-41-1-26 (2004). Our supreme court has held that proof of even the slightest penetration is sufficient to sustain convictions for child molesting. Spurlock v. State, 675 N.E.2d 312, 315 (Ind. 1996), aff'd in relevant part on reh'g (1997). There is no requirement that the vagina be penetrated, only that the female sex organ, including the external genitalia, be penetrated. Smith v. State, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002), trans. denied.

We acknowledge that in the present case, there is no direct evidence of penetration. A.R. testified that Hernandez touched the area between her legs with his penis and that Hernandez's actions hurt her "on the outside . . . on [her] private part," which she described as her genital area. Tr. p. 32. We conclude that this testimony that that Hernandez's penis "hurt" A.R.'s genital area on the outside supports a reasonable inference that Hernandez at least slightly penetrated A.R.'s external genitalia; if there had been no penetration whatsoever, it is reasonable to infer that A.R. would not have experienced any pain. We emphasize that whether penetration, no matter how slight, occurred is a question of fact to be determined by the jury. Borkholder v. State, 544 N.E.2d 571, 577 (Ind. Ct. App. 1989). Here, we will not second-guess the jury's conclusion that Hernandez's sex organ at least slightly penetrated A.R.'s sex organ.

The facts here are not the same as were present in Spurlock, where the twelve-year-old victim was of an age to be able to understand and respond to the question

regarding penetration and testified that she did not know whether penetration had occurred. This, the Spurlock court held was insufficient to establish penetration. See 675 N.E.2d at 315. Here, however, A.R. testified to facts supporting an inference of at least slight penetration of her external genitalia, and this is sufficient to support Hernandez's conviction under Count I.

B. Evidence of Criminal Confinement

Hernandez next claims that there was no evidence that he committed criminal confinement and that his convictions under Counts III and IV should therefore be reversed. The caption of the charging information reads in relevant part:

> COUNT I
> CHILD MOLEST, CLASS A FELONY
> IC 35-42-4-3
>
> COUNT II
> CHILD MOLEST, CLASS A FELONY,
> IC 35-42-4-3
>
> COUNT III
> CHILD MOLEST, CLASS A FELONY
> IC 35-42-3-3
>
> COUNT IV
> CHILD MOLEST, CLASS C FELONY
> IC 35-42-3-3

The captions for Counts I and II refer to Indiana Code section 35-42-**4**-3, the statute defining child molesting, but the captions for Counts III and IV refer to Indiana Code section 35-42-**3**-3, the statute defining criminal confinement. The State does not dispute that there was no evidence of criminal confinement, but claims that the substance of the charging information clearly alleged child molesting, not criminal confinement, and that the reference to the wrong statute was simply a mistake. We agree with the State.

"It has long been held that it is the allegation in the body of the information that defines the crime and not the cited statute." Woodcox v. State, 591 N.E.2d 1019, 1025 (Ind. 1992), abrogated on other grounds by Richardson v. State, 717 N.E.2d 32 (1999); see also Hestand v. State, 491 N.E.2d 976, 980 (Ind. 1986). Although Counts III and IV cited the wrong statute in the caption, the body of the charges clearly allege child molesting. Moreover, the jury was instructed as to child molesting on Counts III and IV, and the jury convicted Hernandez of child molesting on Counts III and IV. See Tr. pp. 220, 251; Appellant's App. pp. 100-01, 112-112A. We fail to see how a typographical error in the caption of the charging information could have misled or otherwise prejudiced Hernandez. See Hestand, 491 N.E.2d at 980.

C. Incredible Dubiosity

In addition to his specific attacks on the sufficiency of the evidence, Hernandez also makes the broader claim that the evidence is insufficient to support any of his convictions because the only evidence against him consisted of A.R.'s testimony. Although acknowledging our standard of review, Hernandez nevertheless claims that we should apply the "incredible dubiosity" rule. As explained in Kien:

> We will not impinge upon the jury's resolution with regard to the credibility of witnesses unless confronted with testimony of inherent improbability, or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. A conviction will be overturned only where a victim's testimony is so incredibly dubious or inherently improbable that it runs counter to human experience, and no reasonable person could believe it. However, this exception is applied only where a single witness testifies.

782 N.E.2d at 407. Hernandez claims that A.R.'s testimony is incredibly dubious, pointing to inconsistencies in A.R.'s testimony, supposed problems in the timeline of

A.R.'s version of events, the fact that none of the other children being babysat observed the molestation, and A.R.'s alleged motivation to lie.

It is "not surprising that a young child in an adversary courtroom setting may demonstrate a degree of confusion and inconsistency." Hill v. State, 646 N.E.2d 374, 378 (Ind. Ct. App. 1995); see also Lowe v. State, 534 N.E.2d 1099, 1100 (Ind. 1989) (stating that it is not surprising that a thirteen-year-old girl, who was being cross-examined by a veteran defense attorney, would become confused at times while testifying and that her testimony in its entirety presented a believable story of sexual abuse). Further, there is nothing about A.R.'s testimony that is so inherently improbable that it runs counter to human experience. She presented consistent testimony that Hernandez repeatedly molested her, and a reasonable trier of fact could have concluded that Hernandez was guilty beyond a reasonable doubt. See Wisneskey v. State, 736 N.E.2d 763, 765 (Ind. Ct. App. 2000) (a conviction for child molesting may rest solely upon the uncorroborated testimony of the child despite the child's limited sexual vocabulary and unfamiliarity with anatomical terms). In summary, the evidence is sufficient to support Hernandez's convictions.

II. Double Jeopardy

Hernandez also claims that his conviction on Count IV, Class C felony child molesting, amounts to double jeopardy because, he claims, it is based upon the same conduct upon which Counts I through III were based. In Richardson v. State, 717 N.E.2d 32 (Ind. 1999), our supreme court has established a two-part test for analyzing double

jeopardy claims under the Indiana Constitution.[1] Specifically, it held that "two or more offenses are the 'same offense' in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." Id. at 49. In a challenge under the "actual evidence" test, the defendant must demonstrate a reasonable possibility that the evidentiary facts used by the jury to establish essential elements of one offense may have also been used to establish essential elements of a second challenged offense. Waldon v. State, 829 N.E.2d 168, 179 (Ind. Ct. App. 2005), trans. denied.

In the present case, Count I alleged that Hernandez had sexual intercourse with A.R. Count II alleged that Hernandez performed or submitted to deviate sexual conduct "involving the sex organ of [A.R.] and the mouth of . . . Hernandez." Appellant's App. p. 26. Count III alleged that Hernandez performed or submitted to deviate sexual conduct "involving the sex organ of . . . Hernandez and the mouth of [A.R.]" Id. Count IV alleged that Hernandez performed or submitted to "any fondling or touching with [A.R.]" Id. at 27. Hernandez claims that there was no evidence that he touched A.R. with anything other than his mouth and his penis, and that the incidents involving his mouth and his penis formed the basis of his convictions on Counts I through III. Thus,

[1] Although Hernandez refers to the Fifth Amendment to the United States Constitution, his argument appears to be based solely upon Article 1, Section 14 of the Indiana Constitution. Because he does not develop an argument based upon the Fifth Amendment, we do not address it. See Minton v. State, 802 N.E.2d 929, 936 n.8 (Ind. Ct. App. 2004) (failure to independently argue double jeopardy under federal constitution waives that argument on appeal), trans. denied.

Hernandez claims that his conviction upon Count IV must be based upon the same conduct. We disagree.

As discussed above, there is evidence supporting a reasonable inference that Hernandez had sexual intercourse, as defined by statute, with A.R. on at least one occasion. This evidence supports Hernandez's conviction under Count I. A.R. testified that on another occasion, Hernandez used his mouth on her sex organ and she placed her mouth on his penis per his instructions. These acts constitute the deviate sexual conduct supporting Hernandez's convictions upon Counts II and III respectively. A.R. also testified that, when Hernandez took her fishing, he touched her sex organ with his penis. This incident is sufficient to establish that Hernandez touched A.R. with the intent to arouse or satisfy his sexual desires as alleged under Count IV. Thus, there was different evidence used to support each of Hernandez's convictions, and Hernandez has not demonstrated a reasonable possibility that the evidentiary facts used by the jury to establish the essential elements of one offense may also have been used to establish essential elements of a second offense.

III. Appropriateness of Sentence

Lastly, Hernandez claims that the sentence imposed by the trial court is inappropriate. The trial court sentenced Hernandez to the advisory term of thirty years on each of his three Class A felony conviction and ordered these sentences to run concurrently. The trial court also imposed the advisory term of four years on Hernandez's Class C felony conviction, and ordered it to run consecutively to the concurrent thirty-year sentences.

Pursuant to Indiana Appellate Rule 7(B), this court may revise a sentence otherwise authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. The advisory sentence is the starting point the General Assembly has selected as an appropriate sentence for the crime committed. Childress v. State, 848 N.E.2d 1073, 1081 (Ind. 2006). On appeal, it is the defendant's burden to persuade us that the sentence imposed by the trial court is inappropriate. Id. at 1080. When the trial court imposes the presumptive sentence, this burden is particularly heavy. Golden v. State, 862 N.E.2d 1212, 1216 (Ind. Ct. App. 2007)

Regarding the nature of the offenses, Hernandez argues that his crimes were not among the worst offenses. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004) (noting the rule that the maximum possible sentences should generally be reserved for the worst offenders and worst offenses), trans. denied. Because Hernandez was sentenced to the advisory, not the maximum, sentences, the "worst offender, worst offense" analysis is inapplicable to his sentences. Other than this, Hernandez claims that the nature of his offenses did not justify the advisory sentence, mostly by repeating his attack on the sufficiency of the evidence supporting his convictions. However, we have already determined that the evidence is sufficient to support Hernandez's convictions. While there may be nothing in the record which would require that Hernandez's sentences be substantially longer than the advisory sentence, the nature of his offenses—the repeated molestation of a young child who was entrusted to his care—does not require the imposition of a sentence less than the advisory term.

With regard to the nature of the offender, Hernandez claims that his advisory sentences are unduly harsh because he has no prior criminal convictions and because he has been consistently employed. Again, while prior convictions and lack of a consistent record of employment may have been reasons for the trial court to impose a sentence greater than the advisory sentence, Hernandez's lack of a criminal history and employment do not require that he be sentenced to less than the presumptive. Too, Hernandez's character, as evidenced by his lack of criminal history, must be balanced against his character as evidenced by his criminal acts in the present case—repeatedly molesting a young girl entrusted to his care. Under the facts and circumstances present in this case, Hernandez has not met his burden of establishing that his aggregate sentence of thirty-four years is inappropriate.

Conclusion

The evidence is sufficient to support Hernandez's convictions, and his convictions do not violate the constitutional prohibition against double jeopardy. Moreover, the sentence imposed by the trial court is not inappropriate.

Affirmed.

MAY, J., and VAIDIK, J., concur.